

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUN IM HARMON)	
Claimant)	
VS.)	
)	
PALMER INTERNATIONAL FOODS)	Docket No. 183,786
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the Award entered by Special Administrative Law Judge Douglas F. Martin on June 17, 1996. The Appeals Board heard oral argument on December 19, 1996.

APPEARANCES

Claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Edward D. Heath, Jr. of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Special Administrative Law Judge entered an Award for permanent partial disability benefits based upon a 100 percent work disability. Respondent appealed that Award and argues claimant has no loss of tasks-performing ability and, therefore, is entitled to a work disability of no more than 50 percent. The nature and extent of claimant's disability is the sole issue before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire file and having considered the briefs and arguments of the parties, the Appeals Board finds that the claimant met her burden of proving a work disability of 88.5 percent and the Award of the Special Administrative Law Judge should be modified.

The parties stipulated the claimant suffered personal injury by accident arising out of and in the course of her employment with respondent on July 15, 1993. Claimant worked for respondent as a clean-up person in a cafeteria. She injured her back while carrying a tray of silverware when she slipped on a wet floor and fell on her buttocks. Since then she has been unable to continue her regular job duties and has not been able to find other employment. Accordingly, claimant seeks a work disability award in excess of her stipulated 10 percent impairment of function. Claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e(a) which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

Respondent does not dispute that claimant is not working and, therefore, is entitled to a 100 percent wage loss. However, respondent does dispute the Special Administrative Law Judge's finding of a 100 percent tasks loss. The above-quoted language in K.S.A. 44-510e(a) requires the percentage loss of tasks-performing abilities to be expressed "in the opinion of the physician." The only tasks loss opinion in the record is that given by Dr. Peter V. Bieri. He gives a 100 percent tasks loss opinion. However, respondent points to the testimony of Dr. Joseph T. Nora as support for the position that claimant's restrictions are not supported by the evidence. Specifically, the objective testing and Dr. Bieri's personal observations of claimant would indicate that claimant is physically capable of performing well beyond what she demonstrates upon testing and perhaps beyond what she herself believes she can do. However, Dr. Nora does not give an opinion

concerning claimant's task loss. Respondent did, upon cross-examination, get Dr. Bieri to admit that there were three tasks claimant could perform up to two-thirds of the day if she were able to alternate sitting, standing, or walking. The testimony of claimant and that of vocational expert Karen Terill establish that claimant's job did not require her to perform those tasks in excess of two-thirds of the day. Accordingly, the Appeals Board finds that claimant retains the ability to perform those tasks. By adjusting Dr. Bieri's opinion to account for his testimony upon cross-examination to find that claimant is capable of performing 3 out of the 13 tasks identified by vocational expert Michael Dreiling, results in a task loss of 77 percent. Combining the 77 percent task loss with the 100 percent wage loss results in a permanent partial disability of 88.5 percent.

The Award by the Special Administrative Law Judge should, therefore, be modified to find an 88.5 percent permanent partial disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Douglas F. Martin dated June 17, 1996, should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sun Im Harmon, and against the respondent, Palmer International Foods, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred July 15, 1993, and based upon an average weekly wage of \$399.20 for 42 weeks of temporary total disability compensation at the rate of \$266.15 per week or \$11,178.30, followed by 333.73 weeks of permanent partial disability compensation in the sum of \$266.15 per week or \$88,821.70, for an 88.5% permanent partial disability, making a total award not to exceed \$100,000.00.

As of January 1, 1997, there is due and owing claimant 42 weeks of temporary total disability compensation at the rate of \$266.15 per week or \$11,178.30, followed by 139 weeks of permanent partial disability compensation at the rate of \$266.15 per week in the sum of \$36,994.85 for a total of \$48,173.15, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$51,826.85 is to be paid for 194.73 weeks at the rate of \$266.15 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
 Edward D. Heath, Jr., Wichita, KS
 Douglas F. Martin, Special Administrative Law Judge
 Bryce Benedict, Administrative Law Judge
 Philip S. Harness, Director